No. 14-770

In The
Supreme Court of the United States

BANK MARKAZI, aka THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL SECURITY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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GLOSSARY OF ABBREVIATIONS

CISADA – Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

IEEPA – International Emergency Economic Powers Act

ITRSHRA – Iran Threat Reduction and Syria Human Rights Act of 2012

ISA – Iran and Libya Sanction Act of 1996

TRIA – Terrorism Risk Insurance Act of 2002

TWEA – Trading with the Enemy Act of 1917

WMDs – Weapons of Mass Destruction

VTVPA – Victims of Trafficking and Violence Protection Act of 2000

INTEREST OF *AMICI*

Amici are law professors who teach and publish in the field of national security law.[1] Several of the *amici* have worked as advocates in the Judge Advocate General's Corp. on legal matters related to national security and counter-terrorism, or held senior-level positions in government working on issues involving national security, economic sanctions, and foreign policy. The members of the *amici* include: William C. Banks, Board of Advisors Distinguished Professor, Director of the Institute for National Security and Counterterrorism, Syracuse University College of Law; Kevin Cieply, President and Dean, Ave Maria School of Law; Geoffrey Corn, Presidential Research Professor of Law, South Texas College of Law; Jimmy Gurulé, Notre Dame Law School; Eric Talbot Jensen, Brigham Young University School of Law; Jeffrey D. Kahn, Southern Methodist University, Dedman School of Law; and Rachel E. VanLandingham, Southwestern Law School.[2]

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[1] This brief has been filed with the written consent of all parties, which filed blanket consents with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief, in whole or in part. Notre Dame Law School has committed $1,400.00 towards the cost of printing and mailing this brief.

[2] Academic affiliation is provided for identification purposes only.

The *amici* believe that the use of economic sanctions is a vital governmental tool to prevent state-sponsored acts of terrorism. Moreover, the *amici* appreciate the importance of the economic sanctions regime carefully crafted by Congress and five consecutive Presidents, working in close coordination, to prevent Iran from sponsoring terrorist activities and developing nuclear weapons of mass destruction (WMD). The *amici* also believe that 22 U.S.C. § 8772 is an integral component of the broader economic sanctions strategy against Iran, and advances vital national security and foreign policy interests. Finally, the *amici* maintain that the judiciary should afford substantial deference to deliberate congressional efforts, implemented with the full support of the Executive, to authorize United States victims of international terrorism to satisfy valid terrorism judgments against Iran with the blocked assets of Iran.

SUMMARY OF THE ARGUMENT

The United States has developed a comprehensive economic sanctions regime to prevent Iran, a state sponsor of terrorism, from sponsoring acts of international terrorism. The International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701 *et seq.*), enacted by Congress in 1977, is the central legal authority for the Iran economic sanctions program. Since the 1983 terrorist attacks against the American

servicemen in Beirut, Lebanon, the IEEPA has been extensively used to block Iranian assets and prohibit United States persons from doing business with Iran.

Following the September 11, 2001 terrorist attacks, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), which created an exception to the IEEPA ban on United States nationals from transferring or dealing in blocked assets of state sponsors of terrorism. The TRIA provides that the "blocked assets of [a] terrorist party" shall be available for execution or attachment to satisfy a judgment against a terrorist party on a claim based upon an act of terrorism. *Id.* § 201(a). Under the TRIA, Congress made a policy determination that national security and foreign policy interests would be better served by making blocked assets of a terrorist party available to compensate the victims of international terrorism, rather than have those assets languish in a United States bank account.

Permitting blocked assets of a terrorist party to be used to satisfy terrorism judgments against a state sponsor of terrorism serves several important national security and foreign policy interests. First, allowing blocked assets to be attached to enforce a terrorism judgment compensates the victims of terrorism for their loss. Second, such enforcement measures hold state sponsors of terrorism accountable for their complicity in acts of terrorism. Third, requiring state sponsors of terrorism to compensate the victims of

terrorism for their loss may deter them from supporting terrorist activities in the future. Finally, attaching blocked assets to satisfy a terrorism judgment provides an important incentive for private plaintiffs to bring similar claims against state sponsors of terrorism in the future. If such assets are placed beyond the reach of victims of terrorism because they are blocked under the IEEPA, this would discourage victims of international terrorism from bringing such tort claims against state sponsors of terrorism.

Section 8772 strengthens the United States economic sanctions regime against Iran. The statute modifies and supplements § 201 of the TRIA, by clarifying Congress's intent that the blocked assets "of" a terrorist party are not limited to assets owned by that terrorist party, but include blocked assets in which a terrorist party holds a beneficial interest. Moreover, § 8772 makes the TRIA coextensive with Executive Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012), which authorizes blocking the assets of the Government of Iran, including the Central Bank of Iran. Specifically, § 8772 provides that $1.75 billion of blocked assets in which the Government of Iran has a beneficial interest shall be subject to attachment to satisfy terrorism judgments against Iran that have been consolidated into a single case if a court determines two preconditions are met.

Despite claims to the contrary, § 8772 was not intended by Congress to tip the scale in favor of one party over another in a pending case, but, instead, to clarify Congress's intent under the TRIA, and to

strengthen the economic sanctions regime against Iran. Further, the judiciary should grant substantial deference to the political branches when, as here, they act in concert against a foreign nation to accomplish a foreign policy objective vital to our national security. Finally, by making the blocked assets of Iran held by Citibank "subject to" attachment to satisfy terrorism judgments against Iran in a pending case, Congress did not usurp the role of the judiciary, and did not violate the doctrine of separation of powers.

ARGUMENT

I. Congress Has Plenary Power to Regulate Foreign Commerce, Including the Disposition of Blocked Assets in Which Iran Has a Beneficial Interest

Article I of the Constitution gives Congress the exclusive and plenary authority "[t]o regulate commerce with foreign nations[.]" U.S. Const. art. I, § 8, cl. 3. The authority to regulate foreign commerce extends to foreign assets used in international commerce. *Orvis v. Brownell*, 345 U.S. 183, 188 (1953); *Propper v. Clark*, 337 U.S. 472, 482-86 (1949). It includes the power to block and dispose of the assets of foreign nations that are held in a United States bank account. Congress shares its authority over interstate commerce with the states, but the power of Congress over foreign commerce is "exclusive and absolute." *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904). As such, Congress has even greater authority

when it comes to regulating commerce with foreign nations. *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 60 (1933). The primary purposes of the foreign commerce clause are protection of national security and ensuring uniformity in foreign policy. *Id.* From a regulatory standpoint, this distinction makes foreign commerce, and by extension, foreign assets, different in kind from domestic commerce. Pursuant to this exclusive and plenary power, Congress created a comprehensive scheme of regulations governing commercial transactions with the Islamic Republic of Iran. As part of that comprehensive regulatory scheme, § 8772 is a proper exercise of the power of Congress to regulate commerce with foreign nations. 22 U.S.C. § 8772.

A. Pursuant to Its Authority to Regulate Foreign Commerce, Congress May Block Foreign Assets

In 1977, Congress enacted the IEEPA, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701 *et seq.*), which delegates to the Executive sweeping authority to impose economic sanctions and block foreign assets in times of declared national emergencies. The IEEPA essentially amended the Trading with the Enemy Act of 1917 (TWEA), 50 U.S.C. app. §§ 1-44, leaving the TWEA intact for times of war. Under the IEEPA, Congress delegated extensive authority to the President to impose economic sanctions against foreign nations as well as their nationals, and to block their assets. Significantly,

the President can prohibit United States banks from engaging in any transactions involving funds in which a foreign country or national thereof has any interest and order that such funds be blocked. 50 U.S.C. § 1702(a)(1)(A)(i). The Office of Foreign Assets Control, the agency within the Department of Treasury responsible for administering economic sanctions programs under the IEEPA, defines "interest" broadly in its regulations and does not restrict blocking actions merely to property in which a foreign nation or national has an ownership interest. 31 C.F.R. § 544.305 (2015). Ultimately, Congress retains concurrent authority to block foreign assets and direct their disposition.

B. The Political Branches have Authority to Settle the Claims of United States Nationals Against Foreign States

Where a United States national has a claim against a foreign state, "it is not for the court, but for the government, to consider whether it be a case proper for compensation." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801). This Court in *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) examined the authority of the political branches to regulate the settlement of claims of United States nationals against the Government of Iran. In that case, Dames & Moore sued Iran and secured judgment by obtaining a prejudgment attachment of Iranian property blocked by an Executive Order issued in response to the 1979 Hostage Crisis in

Tehran. *Id.* at 663-64. Subsequently, to secure the release of the hostages, President Carter entered into an executive agreement under which the United States was obligated to "terminate legal proceedings in United States courts involving claims of United States nationals against Iran, to nullify all attachments and judgments obtained therein, and [refer all such terminated claims] to binding arbitration in an Iran-United States Tribunal." *Id.* at 654.

In *Dames & Moore v. Regan*, this Court addressed the power of the political branches to suspend thousands of claims pending in Article III courts, nullify the prejudgment attachments of American creditors, and order the transfer of blocked assets back to Iran. This Court held unanimously that the President could suspend those claims and, when acting pursuant to congressional acquiescence and the "sweeping and unqualified" authority under the IEEPA, was permitted to "override judicial remedies" and "otherwise permanently dispose of the assets." *Id.* at 671. Moreover, this Court held that the President's nullification of prejudgment attachments did not usurp the role of the judiciary, and therefore did not violate separation of powers. *Id.* at 684. Congressional acquiescence to the President's conduct was central to the Court's decision. *Id.* at 668-70.

Section 8772 is also the product of coordinated action by the Legislative and Executive Branches. While the Executive Order in *Dames & Moore* transferred and nullified prejudgment attachments on blocked assets in response to the Iranian Hostage

Crisis, § 8772 made specific blocked assets available for attachment in satisfaction of judgments stemming from several terrorist attacks sponsored by Iran. In both instances, however, Congress and the President worked together to regulate Iranian assets pursuant to the IEEPA and control their disposition. Applying the reasoning of *Dames & Moore*, if Congress can grant authority to nullify interests of American creditors in blocked assets, it follows that Congress can also nullify the interests of a state sponsor of terrorism in blocked assets, and authorize courts to attach those blocked assets in satisfaction of outstanding terrorism judgments against Iran.

This conclusion is bolstered by the longstanding practice of Congress to settle the claims of United States nationals against foreign states by passing legislation. For example, in 2000, Congress passed legislation governing the payment of specified judgments against Iran and Cuba obtained by victims of state-sponsored terrorism. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (codified at 28 U.S.C. §§ 1606, 1610). In the VTVPA, Congress directed the Department of Treasury to use blocked assets of Iran and Cuba as well as proceeds from consular property rentals to pay the judgments of persons who:

> as of July 20, 2000, held a final judgment for a claim or claims brought under [28 U.S.C. § 1605(a)(7)] against Iran or Cuba, or * * * filed suit under such section * * * on February

> 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000.

28 U.S.C. § 1606(a)(2)(A)(i)-(ii).

Like § 8772, the VTVPA referred to specific judgments and lawsuits. While § 8772 does so by reference to the name of the case into which multiple judgments have been consolidated, the VTVPA did so by reference to judgments obtained by a certain date (the cut off was three months prior to the enactment, so at the time, it necessarily extended to only six judgments) and to five specific dates on which an additional five lawsuits had already been filed, but judgments had not yet been entered. The effect of both statutes is the same – they apply only to a limited number of pending cases expressly identified by Congress in the statute. The VTVPA applied to one case against Cuba and ten cases against Iran, while § 8772 applies to eighteen judgments against Iran. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 57 (D.D.C. 2009); *see also* David M. Ackerman, Cong. Research Serv., *Suits Against Terrorist States* 10, 14-17 (2002). Similar to § 8772, the VTVPA also specified how these judgments would be funded. The VTVPA required that to the extent any judgments against Iran were paid by the United States government from general treasury funds, the President would recover that amount from Iran "preceding the normalization of relations" and that "no funds shall be paid to Iran, or released to Iran, from property blocked under the [IEEPA] or from the Foreign Military Sales Fund, until such subrogated

claims have been dealt with to the satisfaction of the United States." 28 U.S.C. § 1606(c).

II. Section 8772 Is an Integral Component of a Comprehensive Economic Sanctions Regime Against Iran Intended to Protect United States National Security, and Should Be Afforded Substantial Deference by the Judiciary

Iran is "the most active state sponsor of terrorism," and poses an extraordinary threat to United States national security. U.S. Dep't of State, *Country Reports on Terrorism 2014* 284-85 (2015), *available at* http://www.state.gov/documents/organization/239631.pdf. Iran is responsible for financing, supervising, and supporting some of the most deadly terrorist attacks perpetrated against the United States. *Id.* Moreover, the U.S. Department of Defense estimates that Iran provides between $100-200 million per year in funding to Hezbollah. U.S. Dep't of Def., *Unclassified Annual Report on Military Power of Iran* 8 (2010), *available at* http://fas.org/man/eprint/dod_iran_2010.pdf. To curtail Iran's terrorist activities and reduce its ability to develop nuclear WMDs, the political branches have devised a complex and comprehensive counter-terrorism and economic sanctions strategy against Iran.

A. The Economic Sanctions Regime Against Iran

Section 8772 is not an isolated act intended to advantage one party over another in a pending case. Rather, it is an integral part of a deliberate and coordinated effort by Congress and five consecutive presidents over the past thirty years to regulate the foreign assets of Iran in order to advance vital national security and foreign policy interests. The statute is part of a broader and carefully designed counter-terrorism strategy against Iran, which is fully supported by the Executive Branch, and should not be undermined by the judiciary.

1. Early Economic Sanctions Against Iran

Since the Iranian Revolution and Iranian Hostage Crisis of 1979, the United States has imposed economic sanctions against Iran. The IEEPA has been the central legal authority for the comprehensive economic sanctions regime against Iran. In November 1979, President Carter issued Executive Order 12170, declaring a national emergency against Iran. 44 Fed. Reg. 65,729 (Nov. 14, 1979). Executive Order 12170 blocked "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States[.]" *Id.* President Carter subsequently issued Executive Orders instituting a total embargo on United States exports to Iran, Exec. Order No.

12,205, 45 Fed. Reg. 24,099 (Apr. 7, 1980), as well as banning all imports from Iran and prohibiting United States citizens from traveling to Iran, Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (Apr. 17, 1980). However, the Executive Orders were repealed in 1981, pursuant to a bilateral agreement known as the Algiers Accords, in return for which Iran released the American hostages. Exec. Order No. 12,282, 46 Fed. Reg. 7925 (Jan. 19, 1981).

During the Lebanese civil war, the United States began stationing Marines in Beirut, Lebanon in August 1982 as part of an international peacekeeping force. Patrick Taylor, *A World of Trouble: The White House and the Middle East – From the Cold War to the War on Terrorism* 283-84 (2009). On April 18, 1983, a suicide-bomber detonated a truck loaded with explosives in front of the American embassy, killing sixty-three people and wounding dozens more. *Id.* at 290-92. Six months later, on October 23, 1983, another suicide-bomber detonated a truck bomb inside the United States Marine barracks in Beirut, killing 241 American servicemen and injuring over 100 more. *Id.* at 297-98. Hezbollah claimed responsibility for both terrorist attacks. Kenneth M. Pollack, *The Persian Puzzle: The Conflict Between Iran and America* 203 (2004).[3] American intelligence agencies determined that Iran was responsible for training Hezbollah

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[3] *See also* Quinton Cannon Farrar, *U.S. Energy Sanctions and the Race to Prevent Iran From Acquiring Weapons of Mass Destruction*, 79 Fordham L. Rev. 2347, 2354-55 (2011).

terrorists, as well as funding and supervising the attacks. *Id.*

In response to Iran's complicity in the Beirut terrorist bombings, in January 1984, the U.S. Department of State designated Iran a state sponsor of terrorism. *See* 49 Fed. Reg. 2,836 (Jan. 23, 1984).[4] Iran has maintained that infamous distinction for the last thirty years. *See Country Reports on Terrorism 2014*, *supra* at 8. Further, after finding that Iran was "actively supporting terrorism as an instrument of state policy," President Reagan issued Executive Order 12613, which banned all imports of goods and services originating in Iran. 52 Fed. Reg. 41,490 (Oct. 28, 1987). In 1992, Congress became involved in imposing economic sanctions against Iran by enacting the Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571 (codified at 50 U.S.C. § 1701 note), which significantly tightened restrictions on United States exports to Iran.

On March 15, 1995, President Clinton, pursuant to the IEEPA, issued Executive Order 12957, which prohibited all United States investment in Iran's energy sector. 60 Fed. Reg. 14,615 (Mar. 15, 1995). Two months later, the President issued Executive Order 12959, banning all trade between the United States and Iran, including trade by foreign subsidiaries

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[4] Iran was designated a state sponsor of terrorism pursuant to 50 U.S.C. app. § 2405(j), 22 U.S.C. §§ 2371, 2780(d).

of American corporations. 60 Fed. Reg. 24,757 (May 6, 1995). President Clinton tightened restrictions even further in 1997, issuing Executive Order 13059, which prohibited United States companies from knowingly exporting goods to a third country for incorporation into products destined for Iran. 62 Fed. Reg. 44,531 (Aug. 21, 1997).

In 2005, President Bush issued Executive Order 13382, prohibiting the importation into the United States of goods, technology, or services produced or provided by foreign persons who have been sanctioned because of their WMD proliferation activities. 70 Fed. Reg. 38,567 (June 28, 2005).

2. Legislation Imposing Economic Sanctions Against Iran

Congress has played a prominent role in constructing the economic sanctions regime against Iran. While United States trade with Iran significantly diminished after the issuance of Executive Order 12959 in March of 1995, Iran was still able to sell its oil and finance the development of its energy sector by increasing business with foreign countries. In response, Congress enacted the Iran and Libya Sanctions Act of 1996 (ISA), which imposed sanctions against *foreign* firms that reached a monetary threshold level of involvement in Iran's energy sector. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified in part at 50 U.S.C. § 1701 note). The ISA was intended to force foreign

firms to choose between entering into energy-related transactions with Iran and doing business with the United States, essentially amounting to a "secondary boycott" of Iran. *See* Meredith Rathbone, Peter Jeydel & Amy Lentz, *Sanctions, Sanctions, Sanctions Everywhere: Forging a Path through Complex Transactional Sanctions Laws*, 44 Geo. J. Int'l L. 1055, 1069, 1085 (2013).[5]

Among other things, the IEEPA prohibits U.S. persons from transferring, withdrawing, or otherwise dealing in blocked assets. Congress created an exception to this prohibition following the September 11, 2001 terrorist attacks, enacting the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note). Section 201(a) of the TRIA provides that:

> in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, for which a terrorist party is not immune under 28 U.S.C. § 1605(a)(7), the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment * * * in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Id. § 201(a).

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[5] *See also* Farrar, *supra* note 3 at 2359-60.

Section 201(a) represents a deliberate policy judgment by Congress that the blocked assets of a terrorist party, including state sponsors of terrorism, should be subject to attachment to satisfy judgments awarded to terrorism victims against that terrorist party, rather than remain blocked and left to languish in a bank account.[6] While blocking actions under the IEEPA keep blocked assets out of the hands of state sponsors of terrorism, the TRIA went one step further by making those assets subject to attachment to compensate the victims of terrorism for their loss.

In 2010, Congress enacted legislation to strengthen economic sanctions against Iran, passing the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), Pub. L. No. 111-195, 124 Stat. 1312 (codified in part at 50 U.S.C. § 1701 note). The CISADA greatly expands the scope of prohibited activities, banning foreign companies from selling, leasing, or providing to Iran any goods, services, technology, information, or support that would assist Iran in maintaining or expanding its petroleum refineries, and prohibiting foreign businesses from supplying refined petroleum products to Iran. *Id.* § 102. The CISADA also restricts certain international banking relationships to protect the United States financial system from being used by

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[6] The term "blocked assets" is further defined in the TRIA as "any asset seized or frozen by the United States under" the TWEA or the IEEPA. § 201(d)(2), 116 Stat. 2340.

Iran to transfer funds to support terrorism and develop WMDs.[7] *Id.* § 104.

3. Recent Economic Sanctions against Iran

(a) Executive Order 13599

President Obama has issued several Executive Orders strengthening the economic sanctions against Iran.[8] Most pertinent to this case is Executive Order 13599, which provides that:

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[7] U.S. Dep't of Treasury, Iran Sanctions, *CISADA: The New U.S. Sanctions on Iran*, Sanctions Programs and Country Information, http://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/CISADA_english.pdf (last updated Nov. 11, 2015).

[8] *See, e.g.*, Exec. Order No. 13,590, 76 Fed. Reg. 72,609 (Nov. 20, 2011) (imposing penalties on foreign companies with sales to Iran of equipment and services related to Iran's oil industry exceeding a certain threshold); Exec. Order No. 13,608, 77 Fed. Reg. 26,409 (May 1, 2012) (placing individuals and entities violating Iranian sanctions on a Foreign Sanctions Evaders List, and prohibiting such persons from entering the United States or doing business with any United States businesses or individuals); Exec. Order No. 13,622, 77 Fed. Reg. 45,897 (July 30, 2012) (imposing sanctions on foreign financial institutions and persons which knowingly conduct or facilitate significant financial transactions with, or purchase petroleum products from, Iranian oil companies); and Exec. Order No. 13,645, 78 Fed. Reg. 33,945 (June 3, 2013) (imposing sanctions on foreign financial institutions that engage in any significant transactions related either to the Iranian auto industry or the purchase and sale of Iranian rials, including the maintenance of significant funds denominated in Iranian rials outside Iran).

> [a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that are or hereafter come within the United States, or that hereafter come within the possession or control of any United States person, including any foreign branch, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). The Office of Foreign Assets Control has determined that Executive Order 13599 "requires U.S. persons to block all property and interests in property of the Government of Iran, unless otherwise exempt under OFAC." Office of Foreign Assets Control, U.S. Dep't of Treasury, *Frequently Asked Questions: Iran Sanctions*, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx (last updated Oct. 22, 2015). Further, "[a]mong other things [Executive Order 13599] freezes all property of the Central Bank of Iran and all other Iranian financial institutions, as well as all property of the Government of Iran[.]" U.S. Dep't of Treasury, Press Release, *Fact Sheet: Implementation of National Defense Authorization Act Sanctions on Iran* (Feb. 6, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1409.aspx. Pursuant to Executive Order 13599, on February 6, 2012, the government blocked the assets of Bank Markazi, the Central Bank of Iran, that were being held in a Citibank account in New York.

(b) Iran Threat Reduction and Syria Human Rights Act of 2012

In August 2012, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA), Pub. L. No. 112-158, 126 Stat. 1214 (codified at 22 U.S.C. §§ 8701 *et seq.*), amending prior legislation and imposing additional economic sanctions against Iran. Section 502 of the ITRSHRA, codified at 22 U.S.C. § 8772, supplements the TRIA and Executive Order 13599 by providing that "notwithstanding any other provision of law * * * the financial assets that are identified in and the subject of the proceedings in * * * Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)" "shall be subject to execution or attachment * * * in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death" stemming from Iranian-sponsored terrorism if the court determines that two preconditions are met. *Id.* § 8772(a)(1)(C). Section 8772 clarifies Congress's intent under § 201(a) of the TRIA that the blocked assets of Iran subject to attachment to satisfy terrorism judgments are not limited to assets owned by Iran, but include blocked assets in which Iran has a beneficial interest.[9] Further, § 8772 trumps the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1611(b)(1), removing

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[9] In the case of the blocked assets at issue here, Bank Markazi, the Central Bank of Iran, is the sole owner. *See* Pet. App. 97a, 98a n.10, 99a.

any immunity previously held by the Central Bank of Iran. 22 U.S.C. § 8772(a).

The IEEPA, TRIA, Executive Order 13599, and § 8772 work in tandem and comprise a legal framework for regulating and disposing of the blocked assets of Iran. First, the IEEPA authorizes the President, upon declaring a national emergency, to block the assets in which a foreign nation or national thereof has any interest. 50 U.S.C. § 1702(a). The IEEPA prohibits United States persons and entities from dealing in blocked property. *Id.* § 1705(a). Pursuant to the IEEPA, President Obama issued Executive Order 13599, blocking "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran." 77 Fed. Reg. at 6659. Second, the TRIA created an exception to the IEEPA's blanket ban on dealing in blocked property, permitting persons with a terrorism judgment against a terrorist party to satisfy such judgments by attaching blocked assets of that terrorist party to the extent of any compensatory damages. § 201(a), 116 Stat. 2337 Finally, § 8772 ensures that the authority to attach blocked assets under the TRIA to satisfy a terrorism judgment against Iran is coextensive with Executive Order 13599. Section 8772 is consistent in scope, authorizing the attachment of blocked assets in which the district court determines the Government of Iran holds a beneficial interest to satisfy judgments entered against Iran for sponsoring terrorist attacks.

B. The Judiciary Should Afford the Political Branches Substantial Deference in the Context of National Security and Foreign Policy

Under the doctrine of separation of powers, it is well established that when the political branches are acting in the field of national security and foreign affairs, their actions should be afforded deference by the judiciary.[10] This Court explained in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010), that such deference is warranted because "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further [national security] and undermine United States foreign policy, and those that are not."

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[10] *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (internal citation omitted); *Rostker v. Goldberg*, 453 U.S. 63, 64 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

In *Humanitarian Law Project*, this Court rejected challenges to the constitutionality of 18 U.S.C. § 2339B, which criminalizes the provision of material support to a foreign terrorist organization. Plaintiffs argued the statute should require proof that the material support was provided with the specific intent to further the terrorist activities of such an organization. 561 U.S. at 8. Congress, however, made explicit findings in the legislative history that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." *Id.* (emphasis in original) (internal citations omitted). Moreover, Congress's position was supported by an affidavit filed by a State Department official, concluding, "it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions – regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities." *Id.* at 33 (quoting McKune Aff., App. 133, ¶ 8).

The Court refused to second-guess the judgments of the political branches in the realm of national security and counter-terrorism, declaring:

> That evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs * * * We have noted that "neither the Members of this Court nor most federal judges begin the day with

> briefings that may describe new and serious threats to our Nation and its people." It is vital in this context "not to substitute * * * our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."

Id. at 33-34 (internal citations omitted).

This Court's reasoning in *Humanitarian Law Project* applies with equal force in the present case. Working in coordination with the Executive Branch, Congress determined that the blocked assets of the Central Bank of Iran valued at $1.75 billion should be subject to attachment to satisfy several judgments against Iran for its complicity in sponsoring deadly terrorist attacks against United States nationals. In so concluding, Congress advances legitimate national security and foreign policy goals, which include holding Iran accountable for sponsoring acts of terrorism, compensating the victims of Iranian-sponsored terrorist acts for their loss, and deterring Iran from engaging in terrorist-related activity in the future. This determination by Congress and the Executive on the regulation and disposition of Iranian assets blocked under the IEEPA, which is part of the broader sanctions program against Iran, is entitled to substantial deference by the judiciary.

Finally, § 8772 should be upheld under the principle set forth by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), and affirmed in *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981). Justice Jackson stated that when

the President acts pursuant to an express or implied authorization from Congress, he exercises not only his own powers, but also those delegated by Congress. In such cases, the executive action "would be supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U.S. at 637.

While *Youngstown* is an executive powers case, the principle articulated by Justice Jackson has equal application when Congress acts with the full support of the Executive. With respect to § 8772, the Department of Justice was invited by this Court to express its views on whether Bank Markazi's petition for certiorari should be granted. In its brief, the Department of Justice concluded that § 8772 was lawful and did not violate the separation of powers, recommending that the Court deny the petition. U.S. Cert. Br. 19, 24. Thus, § 8772, as an act of Congress passed in coordination with Executive Order 13599, and explicitly supported by the Executive Branch, is entitled to "the strongest presumption and widest latitude of judicial interpretation," and should be upheld by the Court. *Youngstown*, 343 U.S. at 637

III. Section 8772 Does Not Violate Separation of Powers

Section 8772 does not compel a court to enter a judgment for plaintiffs or assess any damages against Iran. Iran's liability and resulting obligations to pay

compensatory damages to each of these plaintiffs were both established by independent Article III tribunals several years before the enactment of § 8772. Moreover, § 8772 does not limit the district court's authority and require the judgments in these proceedings to be satisfied only with the blocked assets of Iran held in the Citibank account. Rather, § 8772 expressly clarifies that certain enumerated assets are "subject to" attachment under the TRIA in satisfaction of outstanding terrorism judgments against Iran so long as a court determines that two preconditions are met. 22 U.S.C. § 8772.

No court has ever found that merely identifying particular assets as subject to attachment in satisfaction of valid outstanding judgments violates separation of powers. While the applicability of § 8772 is admittedly narrow, in the context of foreign affairs and national security, this is both permissible and reasonable. Iran is required under United States law to pay these eighteen judgments regardless of whether it uses the assets described in § 8772 or some other resources to do so. In the years since these judgments were entered, Iran has never made any payments and it does not indicate now that it plans to do so in the future. Instead, petitioner uses this litigation as an attempt to evade its responsibility to pay valid judgments awarded by Article III courts to the surviving family members of United States nationals killed or seriously wounded by Iranian-sponsored acts of terrorism.

Considering Iran's reprehensible conduct in financing the terrorist attacks that support these judgments, followed by its staunch refusal to pay the resulting damages, petitioner's contrived attempt to use separation of powers as a shield from its obligations is a perversion of revered constitutional precepts.

A. Section 8772 Does Not Compel a Court to Enter a Judgment for Plaintiffs or Assess Any Damages Against Iran

The eighteen judgments to which § 8772 applies are the product of extensive litigation before independent judges and damage assessments proposed by neutral special masters. Bank Markazi does not dispute the validity of these judgments nor does it allege that Iran has ever made or will make an effort to pay plaintiffs' outstanding judgments. Pet. App. 55a. Instead, petitioner argues that in providing courts with the proper tool to enforce these eighteen judgments by allowing execution against $1.75 billion in Iranian blocked assets held by Citibank, Congress violated separation of powers.

In each of the eighteen proceedings below, Iran did not respond to the complaint, though it was properly served, and failed to defend itself in court, despite having ample opportunity to do so. Under normal circumstances, a court would award the plaintiff a default judgment solely on the basis of defendant's failure to respond. Fed. R. Civ. P. 55(a).

However, in these cases, under 28 U.S.C. § 1608(e), each plaintiff also needed to "establish[ ] his claim or right to relief by evidence satisfactory to the court" before a default judgment was entered. The district court required each plaintiff "to establish their right to relief by clear and convincing evidence." *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003).

Thus, in each of these eighteen cases, before entering a default judgment, an independent Article III tribunal concluded that there was clear and convincing evidence that (1) Iran was a state sponsor of terrorism at the time of or as a result of the terrorist attack; (2) each plaintiff was a United States national at the time of the attack; and (3) Iran committed acts of terrorism, including "extrajudicial killing, aircraft sabotage, hostage taking, or [provided] material support or resources for such an act" which was "reasonably certain (i.e., more likely than not)" to cause injury to the plaintiff under at least one of several theories of liability. 28 U.S.C. § 1605A(a)(1); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 67-68, 81 (D.D.C. 2010); *Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir. 2003). The district courts individually considered the claims of over 1,000 plaintiffs, and engaged in a factual inquiry with particularized rulings in each cause of action raised. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007). Iran did not dispute these allegations at trial, nor does petitioner challenge the judicial determinations now.

Upon entering a judgment for the plaintiffs, these cases were referred to special masters for further consideration of the appropriate amount of monetary damages to be awarded to each plaintiff. *Id.* at 52-53. It was the job of these neutral special masters to follow the court's administrative framework and "undertake a very thorough, painstaking review of all the relevant testimony, medical evidence, economic reports, and other evidence in order to make clear, accurate recommendations" to the court relating to the damages suffered by each plaintiff. *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 110 (D.D.C. 2009).

Congress did not dictate any of these judgments. Rather, § 8772 was enacted by Congress to help give effect to the judgments already entered by independent tribunals. The only effect of § 8772 is to clarify the authority of the judiciary under the TRIA to attach particular assets (that were already judicially restrained in 2008 and blocked by the President in February 2012) in satisfaction of the outstanding judgments upon a finding that two preconditions are met.

In contrast to the statute invalidated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), which prevented judges from giving effect to executive pardons, § 8772 furthers the interests of the Judicial and Executive Branches rather than curtail them. Section 8772 helps the courts to enforce outstanding judgments whereas the statute in *Klein* constricted

the operation of judicial processes. In enacting § 8772, Congress merely provided a clear standard for attachment of these blocked assets in order to help the court enforce its outstanding judgments and further the foreign policy goals of the Legislative and Executive Branches.[11] As such, § 8772 is readily distinguishable from the statute struck down in *Klein*.

B. Section 8772 Clarifies the Standard for Attachment Under the TRIA in Regards to the Blocked Assets of Iran

Section 8772 was enacted to help the judiciary execute the judgments entered against state sponsors of terrorism by Article III tribunals. The obstacles encountered by the plaintiffs in this case are a testament to the difficulty of executing judgments against a foreign state that is unwilling to pay them. Congress enacted the TRIA with a more general application that was aimed at helping plaintiffs in this predicament satisfy their outstanding judgments against state sponsors of terrorism. § 201(a), 116 Stat. 2337 However in certain instances, narrow construction of the TRIA by the judiciary has prevented § 201(a) from achieving the legislative goals of holding

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[11] Section 8772 does not restrict courts to satisfying the outstanding judgments with only these assets. If other assets became available, the court could allow plaintiffs to attach them as well. Section 8772 merely enhances the ability of the judiciary to enforce its judgments.

Iran accountable for sponsoring terrorism and compensating its victims.

Specifically, some courts have held that the "blocked assets of" a terrorist party subject to attachment under § 201(a) of the TRIA includes only those assets in which a state sponsor of terrorism had an ownership interest. *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). However, Congress did not intend to limit the class of assets subject to attachment under the TRIA to merely those blocked assets that Iran, or any state sponsor of terrorism, owns outright. Such a narrow construction places the overwhelming majority of blocked assets beyond the reach of United States victims of terrorism with outstanding judgments.

There are few assets subject to United States jurisdiction in which a state sponsor of terrorism has an outright ownership interest. After thirty years of economic sanctions, Iran is very experienced in structuring its financial transactions to evade detection by United States federal regulators.[12] Executive

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[12] Office of Foreign Assets Control, U.S. Dep't of Treasury, *Advisory on the Use of Exchange Houses and Trading Companies to Evade U.S. Economic Sanctions Against Iran* (Jan. 10, 2013), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20130110_iran_advisory_exchange_house.pdf; Memorandum of Order, *United States v. HSBC Bank USA, N.A.*, No. 1:12 Cr. 00763 (E.D.N.Y. 2013) (HSBC affiliates assisted Iran in evading U.S. sanctions from 2000 to 2006 by "altering and routing payment messages in a manner that hid the identities of" the sanctioned entities party to the transactions).

Order 13599 was issued precisely in response to such practices. *See* 77 Fed. Reg. at 6659 (issued "particularly in light of the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation").

The ownership structure of the assets at issue in this litigation aptly demonstrates the lengths to which Iran goes in order to conceal its transactions from United States authorities. The $1.75 billion in registered federal government bonds was held by a New York bank in a custodial omnibus account that was maintained by a Luxembourg-based financial intermediary, in part, on behalf of an Italian bank, which had received the assets from Bank Markazi, the Central Bank of Iran, which is wholly owned by the Government of Iran. *See* Pet. App. 58a-62a. The transaction spanned four banks across three continents. The complexity of modern international banking is difficult to overstate. In every transaction, there may be, and often are, many stakeholders whose identities are not readily ascertainable. In the sensitive field of foreign relations, while Congress may delegate broadly, it must legislate narrowly to offer courts clarifying guidance regarding this sensitive subject matter. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

C. Section 8772 is Not Unconstitutional Merely Because it Applies to a Limited Class of Pending Cases.

Section 8772 is not unconstitutional just because it has a narrow application; the sensitive subject matter of the statute necessarily requires a narrow reach. Outstanding judgments by nationals of one country against the government of another are a delicate matter of foreign policy in a typical situation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964). But when the outstanding judgments stem from personal injury or death caused by terrorist attacks, and the two nations involved have had no diplomatic relations in over thirty years, the complexity and sensitivity is further heightened. In this context, the political branches must have discretion "to apply a remedy to a case as it may arise." *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981).

Congress can enact a statute that clarifies the law applicable to a limited class of pending cases. *Axel Johnson, Inc. v. Arthur Anderson & Co.*, 6 F.3d 78 (2d Cir. 1993). This is especially true in cases concerning sensitive issues of foreign relations with hostile states. Section 8772 does not change the law for a single favored plaintiff, as petitioner contends, but rather changes the applicable law for a limited class of cases all stemming from Iranian-sponsored terrorist attacks.

The reference to specific proceedings by name in § 8772(b) does not limit the application of the statute to a single plaintiff; it merely identifies the specific assets to which the new statute applies. 22 U.S.C. § 8772(b). In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), this Court held that the express reference in a statute to two pending cases, identified by name and caption number, was not a separation of powers violation. Rather, it "served only to identify the 'five statutory requirements that [were] the basis for' those cases." *Id.* at 440 (internal citations omitted).

Here, the express reference to "Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)" in § 8772(b) similarly serves to identify the assets to which the statute applies. This is both permissible and reasonable, as including a description of the complex assets contemplated by the statute would be lengthy at best. At worst, it could be vague and cause adverse foreign policy consequences when applied to unanticipated situations.

Section 8772 is not a "one-case-only regime" (Pet. Br. 26), but applies to a limited class of outstanding judgments already entered against Iran. Section 8772(c) provides that the statute applies to the "proceedings referred to in subsection (b)[,]" expressly extending to several *proceedings*, not a single *proceeding*. 22 U.S.C. § 8772(c). Rather than write out each of the potential qualifying judgments, Congress limited the applicability to § 8772 by a shorthand reference to the case into which all the judgments

had been, or would be, consolidated for purposes of execution.[13]

CONCLUSION

Compensating victims of terrorism with assets in which Iran, a state sponsor of terrorism, has a beneficial interest serves important national security and foreign policy goals. First, such enforcement measures hold Iran accountable for sponsoring terrorist attacks. Second, the victims of terrorism and their families are compensated for their injuries or wrongful death. When the Bank Markazi bonds were blocked by the President, Congress enacted § 8772 to clarify the scope of the TRIA as it applies to these complex assets, mindful of the fact that leaving the assets to languish in a bank account did not accomplish either objective. As such, Congress made clear that if the court finds Iran has a beneficial interest in these assets, they should be subject to attachment in satisfaction of outstanding terrorism judgments consolidated in this action. Enforcing plaintiffs' judgments will provide some minimum closure and compensation to victims and surviving family members, many of who have waited for over thirty years for a measure of justice. Finally, it will encourage other

[13] The list of parties covered by these eighteen judgments spans over thirteen pages in petitioner's appendix. Pet. App. 130a-144a.

victims of terrorism to bring similar lawsuits against terrorist states.

These significant foreign policy and national security considerations distinguish § 8772 from the exclusively domestic statute invalidated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Balancing Congress's extremely high interest in holding Iran accountable for financing terrorist attacks and deterring its future sponsorship of such acts, against petitioner's interest in avoiding responsibility for paying these judgments, § 8772 does not violate separation of powers. Finally, § 8772 is an integral part of a coordinated effort by the political branches to regulate the foreign assets of Iran, a state sponsor of terrorism, to advance vital national security interests, and should not be undermined by the judiciary.

The decision of the Second Circuit Court of Appeals judgment should be affirmed.

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